IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-WY-2015-WD

VERNON R. MILLER,

Plaintiff(s),

vs.

COLORADO FARMS, et al.

Defendant(s).

ORDER GRANTING COLORADO FARMS'
MOTION TO DISQUALIFY PLAINTIFF'S TRIAL COUNSEL

O. Edward Schlatter, United States Magistrate Judge

Colorado Farms has filed a Motion to Disqualify James R. Benson "(Benson"), who is trial counsel for Vernon Miller ("Miller"). Colorado Farms alleges that Benson is likely to be a witness at any trial of this case, and that he is, therefore, ethically prohibited from also proceeding as counsel for Miller. Miller objects to the motion. I agree with Colorado Farms, and will grant its Motion to Disqualify.

BACKGROUND

This case was initially filed by Vernon Miller. In his Complaint, he asked the court to compel Colorado Farms and the other defendants (collectively, "Colorado Farms") to specifically perform a contract for the purchase of some acreage. In the contract, Miller was the purchaser, and Colorado Farms was the seller. The contract provided that upon the consummation of the sale, Miller would lease the property back to Colorado Farms. Colorado Farms had been receiving payments from the Farm Service Agency ("FSA") under the Conservation Reserve Program, and the contract for

sale was conditioned upon a commitment from FSA to continue to pay Colorado Farms those payments until the expiration of the term of the lease. However, FSA issued a memorandum in which it indicated that defendants would likely not be able to continue collecting the payments under the terms of the deal which was proposed by Miller and defendants.

In light of the memorandum by FSA, Colorado Farms refused to proceed to closing. Miller then commenced this lawsuit, and contemporaneously filed a *lis pendens* against the real estate which was the subject of the contract. After Miller filed this suit, Colorado Farms filed two counterclaims against Miller: (1) slander of title, and (2) abuse of process. Both counterclaims related to Miller's filing of the lawsuit, and the filing of a *lis pendens* against the subject property.

On February 17, 1999, District Judge William F. Downes granted summary judgment in favor of Colorado Farms on all of Miller's claims. On November 9, 2000, he denied Miller's request for summary judgment as to the two counterclaims. Judge Downes ruled that a commitment from FSA with respect to the continuation of payments to Colorado Farms was a condition precedent to the enforceability of the contract. Because FSA would not commit to continue the payments, the contract for sale was no longer valid.

At this stage of the proceedings, the only claims which remain are the two counterclaims against Miller, for slander of title and abuse of process. The original

positions of the parties are now reversed: Colorado Farms now stands in the position of plaintiff, and Miller stands in the position of defendant.

In its Motion to Disqualify, Colorado Farms points out that Miller is apparently attempting to rely upon a defense of "advice of counsel." Colorado Farms points to the affidavit which Miller submitted in support of his motion for summary judgment as to the two counterclaims. In that affidavit, Miller stated, "[t]he only reason a *lis pendens* was recorded on the property was to maintain, *upon the advice of my attorney*, the status quo of the ownership of the property. . . *See* Colo. Farms' Mtn Disqual., Ex. A, ¶ 2, emphasis added.

Because Miller will rely upon the defense of advice of counsel, Colorado Farms argues that "the testimony of James R. Benson, Jr. will be relevant, material and unobtainable elsewhere." Id. at ¶ 26. Colorado Farms asserts that Benson and Miller were, presumably, the only parties to the communications between them. Id. at ¶ 28. Thus, the only means available to Colorado Farms to probe the defense of advice of counsel is through one or both of these people.

Miller has never formally asserted the defense of advice of counsel. *See* my Recommendation of June 30, 2000, at 8 ("Mr. Miller has not filed any pleading asserting his advice of counsel defense, and this defense may not properly be raised in a response to a motion [for] summary judgment."). In his Response to the Motion to Disqualify, Miller does not deny that he will rely upon the defense of advice of counsel. Instead, he appears to admit or agree that advice of counsel is being asserted as his defense. Miller's arguments in his Response center upon his claim that Benson should

not be disqualified as his counsel because, although Benson may be a witness in regard to the facts which underlie Miller's defense, he is not a *necessary* witness. In Miller's view, any testimony which may be obtained from Benson is also available from Miller. Miller Resp. at ¶ 4D. Therefore, he argues, Benson should not be disqualified as his counsel.

DISCUSSION

Assuming that Miller has properly asserted the defense of advice of counsel, he must meet four requirements in order to establish this defense:

> (1) a request for advice of counsel on the legality of a proposed action, (2) full disclosure of the relevant facts to counsel, (3) receipt of advice from counsel that the action to be taken will be legal, and (4) reliance in good faith on counsel's advice.

C.E. Carlson v. SEC, 859 F.2d 1429, 1436 (10th Cir. 1988); *see also* Colo. Jury Instr., Civil 17:7 (4th ed.). Of course, Colorado Farms is entitled to discover from the opposition all evidence which bears upon, or is related to, these four requirements.

Both sides of this lawsuit agree that the law which governs disqualification of counsel was stated accurately in World Youth Day, Inc. v. Famous Artists Merchandising Exch., Inc., 866 F.Supp. 1297 (D.Colo. 1994). In that case, the court stated:

> A motion to disqualify counsel is addressed to the sound discretion of the district court. [FDIC v. Isham, 782 F.Supp. 524, 528 (D.Colo. 1992).] The District of Colorado applies the rules of professional conduct, as adopted by the Colorado Supreme Court, as the standard of professional responsibility applicable here. D.C.COLO.LR. 83.6. WYD's motion rests upon Colorado Rule of Professional Conduct 3.7 (Rule 3.7) which reads in relevant part: "a lawyer shall

not act as an advocate at a trial in which the lawyer is likely to be a necessary witness. . . ." The comments to Rule 3.7 succinctly state its reason:

> Combining the roles of advocate and witness can involve a conflict of interest between the lawyer and client and can prejudice the opposing party. If a lawyer is both counsel and witness, the lawyer becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her own credibility.
>
> The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness would be taken as proof or as an analysis of the proof.

Id. at 1301-02.

In order to determine whether an attorney is "likely to be a necessary" witness, the court in World Youth Day looked to an Ethics Opinion from the Colorado Bar Association:

> Before an advocate will be disqualified under Colorado Rule 3.7, it must be "likely" that the lawyer will be a "necessary" witness. Compare DR 5-101(B) (attorney must decline employment if the attorney "ought to be called" as a witness). The "necessary" witness standard is recognized as requiring "an even more specific showing of necessity" than the Code. Security General Life Ins. co. v. Superior court, 149 Ariz. 332, 718 P.2d 985 (1986) (Rule 3.7(a) requires a showing that the proposed testimony is relevant, material and unobtainable elsewhere). It has been held that the advocate's testimony must be necessary, and not merely

> cumulative, and that the court may delay ruling on a motion to disqualify until it can determine whether another witness can testify.

World Youth Day, 866 F.Supp. at 1302, quoting CBA Ethics Committee Opinion, Formal Opinion No. 78: Disqualification of the Advocate/Witness, 23 *The Colorado Lawyer* 2087 (September 1994). In summary, a lawyer is a "necessary" witness if his or her testimony is relevant, material and unobtainable elsewhere.

Miller argues that Colorado Farms has not met the test of World Youth Day. He asserts that "[a]nything to which [Benson] can testify regarding his advice to his client is obtainable elsewhere, in particular, it can be obtained from Mr. Miller, to whom the advice was given," or from James B. Dean, Miller's transactional counsel. Miller Resp. at ¶ 4 D. Thus, in Miller's view, testimony from Benson would be cumulative and duplicative. Miller distinguishes the facts in World Youth Day and this present case by stating that the credibility of the lawyer in World Youth Day "was clearly in issue, whereas, the credibility of Miller's counsel will not be an issue in this case." Id. at ¶ 4 B.

I disagree with Miller's analysis of the circumstances which are presented here. First, Miller does not argue that testimony from Benson would not be relevant or material. Instead, he argues that the testimony is unnecessary because it is merely duplicative of what Miller would testify. This assertion *presumes* that the testimony from Benson, in fact, would mirror the testimony from Miller. I have been shown no evidence which would support such a presumption. However, even if the presumption is true, Colorado Farms is not required at this stage of the proceedings to merely accept the

pronouncement of Miller, or of Benson, that Benson's testimony would duplicate his own.

Second, contrary to Miller's assertion in his Response, credibility *is* an issue in this case. Colorado Farms is entitled to test the credibility of Miller's assertions with respect to his claim of advice of counsel, and one way to do that, possibly the only way, is to depose the attorneys who listened to his recitals, and provided advice in response. The stories of client and counsel may or may not be identical, but, either way, Colorado Farms is entitled to discover the evidence and testimony which may be available, both from Miller and from counsel. If Colorado Farms determines from its discovery efforts that Benson's testimony, in addition to Miller's, ought to be heard by the jury, it is entitled to make that determination.

In the Isham case, the court ruled that the question to answer is not simply *whether* a party will call a lawyer as a witness, but whether the attorney *ought* to be called as a witness. FDIC v. Isham, 782 F.Supp. at 528. In the Isham case, the defendants were asserting their reliance upon the advice of counsel as their defense. Even though defendants themselves stated that they did not intend to call their attorney to support their defense, the court concluded that the lawyer "ought" to be called as a witness, if not by the defendants, then perhaps by the FDIC. Id; *see also* DR 5-101(B) (attorney must decline employment if the attorney "ought to be called" as a witness). A client, such as Miller, should not be placed in the position where he must balance

competing interests: whether to keep Benson as his attorney, and thereby lose him as a witness, or whether to lose him as an attorney, but gain him as a witness.

Whether Miller intends to utilize Benson as a witness or not, as a practical matter Benson cannot *avoid* being a witness. At any trial of this case, Miller will be asked, whether by Benson or by counsel for Colorado Farms, about his communications with his lawyer, about the advice which the lawyer provided, and about his reliance upon the advice. And who was that lawyer? Mr. Benson, who stands before the jury as advocate for Miller. Thus, even if Benson did not testify at the trial, he would appear to the jury as a mute witness with regard to the matters about which Miller will testify. Whether intended or not, Benson would not be able to present this case to a jury without being both witness and advocate to the events which are at the heart of this case.

The court noted in the Isham case that the critical question to ask is

> whether the litigation can be conducted in fairness to all parties. Disqualification should not be imposed unless the claimed misconduct in some way "taints" the trial or the legal system.

Id. In Isham, where advice of counsel was at issue, the court found "a substantial risk that a jury will be confused by an advocate also appearing as a witness." Id. The same circumstances exist here. Benson's dual role would taint the trial and give either Miller or Colorado Farms an unfair advantage in rebutting or advancing Miller's defense. The need for disqualification of Benson in this case is magnified in light of the fact that the defense of advice of counsel will be the key, if not the only, issue in this entire case.

CONCLUSION

Colorado Farms has satisfied its burden, and has demonstrated that Mr. Benson ought to be disqualified as counsel for Miller. Before concluding that Mr. Benson ought to be disqualified, I have given due regard to the fact that his disqualification is likely to work substantial hardships upon Miller, including financial hardships as well as difficulties in re-starting this case with new counsel. *See* Religious Technology Center v. F.A.C.T.Net, Inc., 945 F.Supp. 1470, 1474-75 (D.Colo. 1996). However, after balancing the burdens upon Miller against the interests of Colorado Farms in a trial which is free of taint, I conclude that the balancing weighs in favor of Colorado Farms.

It is therefore ORDERED that "Colorado Farms' Motion to Disqualify Plaintiff's Trial Counsel" [filed December 20, 2000] is GRANTED.

DATED this _____ day of June, 2001.

BY THE COURT:

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O. Edward Schlatter
United States Magistrate Judge